IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 216 of 1995.

Judgement reserved on: 3.5.2007

Date of decision: 7.5.2007.

Shashi Bala & ors. ….. **Appellants.**

Vs.

Prem Lal …. **Respondent.**

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1]

For the Appellants : **Mr. Tara Singh Chauhan, Advocate.**

For the Respondent : **Mr. G.C.Gupta, Sr. Advocate with Mr. Mohinder Gautam, Advocate.**

Kuldip Singh, Judge.

The defendant has filed appeal against the judgement and decree dated 3.5.1995 passed by the learned District Judge, Bilaspur in Civil Appeal No. 86 of 1998, confirming the judgement and decree dated 10.5.1988 passed by the learned Sub Judge, Bilaspur. The appellant- defendant has died during the pendency of the appeal and his legal representatives have been brought on record.

2. The facts in brief are that plaintiff filed suit for declaration that he is owner in possession of land measuring 135-13 Sq. decimeters comprised in khasra Nos. 309 and 310, situate in Luhnu Mina , Pargana and Tehsil Sadar, District Bilaspur with consequential relief of permanent prohibitory injunction. The plaintiff is owner in

---

Whether the reporters of the local papers may be allowed to see the Judgment?

possession of the land comprised in old khasra No. 12, measuring 4 Biswas. The khasra Nos. 309, 310 have been carved out of khasra No. 12. During settlement operation , defendant in collusion with the settlement officials got his name entered in the column of possession and the said entry is wrong and the plaintiff is bound by the same. Plaintiff asked the defendant to get the entries changed. The order dated 6.8.1985 passed by Assistant Collector, 2nd Grade, which was upheld by Collector (Settlement) on 4.11.1986 are wrong, illegal and not binding on the plaintiff. In these circumstances, plaintiff filed the suit.

3. Defendant contested the suit and denied that plaintiff is owner in possession of the suit land. He took the plea that he is owner of the suit land by way of adverse possession for the last 35 years. He has denied that entry was changed in collusion with the settlement officials. The order passed by Assistant Collector, 2nd Grade and Collector are legal. On these grounds, the defendants prayed for dismissal of the suit.

4. The trial court decreed the suit and held that plaintiff is owner in possession of land comprised in khasra Nos. 309 and 310, measuring 135-13 Sq. decimeters. The defendant was also restrained by way of permanent prohibitory decree from interfering in the ownership and possession of the plaintiff on the suit land.

5 The defendant filed appeal against the decision dated 10.5.1988. In the appeal, defendant filed an application, under Order 6, Rule 17 CPC for amendment of the written statement for incorporating the pleas of gift of the suit land, easement of

prescription and necessity. Learned District Judge dismissed the appeal and the amendment application on 3.5.1995.

6. I have heard the learned counsel for the parties and have also gone through the record.

7. The appeal has been admitted on the following substantial questions of law:-

1. Whether under the circumstances of the case, the learned Lower Appellate Court was justified in rejecting the application for amendment of the written statement filed before it?
2. Whether the courts below were justified in holding that the entries incorporated in 1986 showing the defendant to be in possession of the land in dispute as “Dharmarth” were wrongly done and was not regularly done?
3. Whether the learned courts below were not justified in not taking into consideration the admissions made by the plaintiff and other parties before the settlement authorities with respect to the possession and cultivation by the defendant of the land in dispute?
4. Whether under the circumstances of the case the presumption attached to the revenue entries had not been rebutted because demonstratively the entries in the revenue records with respect to possession and the nature of land, were found to be wrong.

8. The learned counsel for the appellant- defendant has submitted that the amendment application of the defendant has been wrongly dismissed by learned District Judge. According to him the Assistant Collector and Collector (Settlement) have rightly recorded the possession of the defendant on the suit land. The

respondent -plaintiff has made admissions with respect to the possession of the defendant before the settlement authorities. The presumption attached to revenue entries has not been rebutted by the plaintiff. On the contrary, learned counsel for the plaintiff has submitted that there is no substantial question of law involved in the appeal, which requires determination by this Court. The amendment application has been rightly dismissed by the first appellate court. The two courts below have concurrently held that plaintiff is owner in possession of the suit land. No case has been made out by defendant for interference.

Substantial question of law No.1:

9. The learned counsel for the defendant has submitted that learned District Judge has erred in dismissing the amendment application of the defendant. He has submitted that the case which defendant sought to introduce by way of amendment has been considered by the learned District Judge on merits without giving an opportunity to the defendant to prove that case. It has been submitted that the proposed amendment is necessary in order to adjudicate the real controversy between the parties. The amendment has been wrongly declined by the learned District Judge. According to him amendment application can be filed at any stage of the proceedings. On the contrary learned counsel for the plaintiff-respondent has submitted that no substantial question of law is involved in the decision of the learned District Judge dismissing the amendment application. He has submitted that the proposed

amendment is not necessary in order to adjudicate the real controversy between the parties.

10. A perusal of the amendment application would show that defendant wanted to take the plea of gift of the disputed land made by plaintiff and his father to defendant in June, 1954 and since then the defendant is in open, continuous and adverse and hostile possession of the suit land as owner by way of adverse possession which has matured into full fledged right in June, 1965. The defendant in the original written statement has taken the plea of adverse possession of the suit land for the last 35 years. The defendant by way of amendment wanted to fix the date of starting of adverse possession, which according to him started in June, 1954. In the proposed amendment, the defendant nowhere pleaded that he has become owner of the suit land on the basis of the gift, his case even in the proposed amendment continued to be of an adverse possession. At the most by way of amendment he wanted to fix the starting time of adverse possession from June, 1954. In proposed amendment he has not pleaded ownership of suit land by way of adverse possession or alternatively by way of gift. The rejection of the amendment application by the learned District Judge to incorporate the plea of gift, has not caused any prejudice to the defendant inasmuch as his plea of adverse possession, which was already in the original written statement remained intact and it has been considered by the learned District Judge.

11. In the original written statement it is not the case of the defendant that there is a passage through khasra No. 310. The

easement of necessity and easement of prescription are distinct easements and different requirements are to be satisfied for claiming these easements. The application for amendment was filed in the year 1993 in the first appeal, whereas the suit was filed on 26.6.1987. No doubt, the amendment application can be filed at any stage but delay in filing the amendment application is also a factor, which is to be taken into consideration while deciding amendment application.

12. The learned counsel for the appellant has relied on following judgements of the Hon'ble Supreme Court in support of his submissions:-

(i) **Mohammad Mustafa** vs. **Sri Abu Bakar and others** [1970 (3) SCC 891]. In this judgement, the Hon'ble Supreme Court on facts allowed the application filed in the High Court for amendment of the written statement for taking the plea that two pharmacies alleged to have been gifted to other sons of Sanaullah should also be considered as joint properties.

(ii) **Smt. Ganga Bai** vs. **Vijay Kumar and others** [1974 (2) SCC 393], the Hon'ble Supreme Court has held that power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the court.

(iii) **Haji Mohammed Ishaq WD. S.K.Mohammed and others** vs. **Mohammad Iqbal and Mohamed Ali and Co**. [1978 (2)

SCC 493], the Hon'ble Supreme Court has upheld the order of High Court rejecting the application for amendment by observing "The amendment of the written statement sought was on such facts which, if permitted to be introduced by way of amendment, would have completely changed the nature of their original defence. It would have brought about an entirely new plea which was never taken up either at the time of the dealings between the parties or in the original pleadings".

(iv) **Sampath Kumar** vs. **Ayyakannu and another** [2002 (7) SCC 559], the Hon'ble Supreme Court allowed the amendment application of the plaintiff on facts which arose during the pendency of the suit, though the application was filed quite late.

(v) **Rajesh Kumar Aggarwal** vs. **K.K.Modi** [2006 (4) SCC 383], the amendment was based upon cause of action arose during the pendency of the suit.

(iv) **Baldev Singh and others** vs. **Manohar Singh and another** [2006 (6) SCC 498], application for amendment of the written statement was rejected by the High Court and the trial court mainly on three grounds. The first ground was certain admissions made in the written statement and by way of amendment those admissions cannot be permitted to be withdrawn. Secondly the question of limitation cannot be allowed to be raised by way of amendment in the written statement and thirdly inconsistent pleas in the written statement cannot also be allowed to be raised by seeking its amendment. The Hon'ble Supreme Court on facts of that case did

not accept the grounds of rejection of the High Court as well as of the trial court.

13. The above judgements relied upon by the learned counsel for the appellant are of no help to the appellant, rather in **Haji Mohammed Ishaq WD. S.K. Mohammed and others** vs. **Mohammad Iqbal and Mohamed Ali and Co** (supra), the Hon'ble Supreme Court has upheld the order of the High Court rejecting the application for amendment on the ground that if amendment of the written statement permitted, it would have completely changed the nature of original defence. It would have brought about an entirely new plea which was never taken up either at the time of the dealings between the parties or in the original pleadings. It is not the case of the defendant that the plea which he wanted to take in the amendment was not in his knowledge when the original written statement was prepared. The proposed amendment is not based upon subsequent events. The amendment if allowed will cause prejudice to the plaintiff. It will reopen the case from the very beginning. Plea of passage through khasra No. 310 is not in the un-amended written statement.

14. Therefore, the amendment application of defendant for incorporating the plea of right of passage as an easement of necessity and prescription through khasra No. 310 since 1954, in my opinion has been rightly rejected by the learned District Judge. The substantial question of law No.1 is decided against the defendant.

Substantial question of law Nos. 2, 3 and 4:

15. The defendant has taken the plea of adverse possession in the written statement in order to show his possession and title on the suit land. This plea of the defendant has been concurrently rejected by two courts below. The findings of the two courts are based upon pure appreciation of evidence. Moreover, in Ex. P-3 jamabandi 1956-57, Ex. P-4 jamabandi 1960-61, Krishan father of the plaintiff has been shown one of the owners and in possession of khasra No. 12, measuring 4 Biswas. In Ex. P-5 jamabandi 1964-65, plaintiff has been shown as one of the owners and in possession of khasra No. 12. This position continued in Ex. P-6 jamabandi 1966-67, Ex. P-7 jamabandi 1971-72, Ex. P-8 jamabandi 1976-77 and Ex.P-1 jamabandi 1981-82. In Ex. D-1 jamabandi 1984-85, plaintiff has been shown owner, but defendant has been shown in possession of khasra Nos. 309 and 310. The change has been ordered by Assistant Collector, vide order dated 6.8.1985 Ex. D-5 incorporating the name of the defendant in the revenue record on khasra Nos. 309 and 310 in the column of possession and plaintiff in the column of owner. The order dated 6.8.1985 has been upheld by Collector (Settlement), vide order dated 4.11.1986 Ex. P-2. The orders dated 6.8.1985 and 4.11.1986 are subject to the decision of civil court and both the courts below have concurrently held that the plaintiff is owner in possession of the suit land. The perusal of Ex. D-3 jamabandi 1984-85 would show that land which was gifted to defendant is not the suit land but it is some other land. The learned counsel for the defendant has failed to point out any admission of the

plaintiff before the settlement authorities whereby he has admitted the case of the defendant. The admission, however, can always be shown to be wrong. It has been proved on record that plaintiff is owner in possession of suit land and the defendant has no title on the suit land. The plaintiff has proved his ownership and possession on the suit land by longstanding revenue entries in jamabandies to which presumption of truth is attached, which has not been rebutted by the defendant. The two courts below have rightly appreciated the material on record. The substantial questions of law No. 2 to 4, are decided against the appellant- defendant. No case for interference has been made out by the defendant.

16. No other point was urged.

17. In view of above discussion, appeal is dismissed. Impugned judgement and decree are upheld with no orders as to costs.

May 7, 2007. **(Kuldip Singh)**
(*Hem*) **Judge.**